



**Republic v Principal Secretary, Ministry of Lands and Physical Planning
& 2 others; Ndambuki (Exparte Applicant) (Judicial Review Application
E003 of 2022) [2023] KEELRC 536 (KLR) (2 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 536 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
JUDICIAL REVIEW APPLICATION E003 OF 2022
AK NZEI, J
MARCH 2, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

**PRINCIPAL SECRETARY, MINISTRY OF LANDS AND PHYSICAL
PLANNING 1ST RESPONDENT**

**CABINET SECTERARY, MINISTRY OF LANDS AND PHYSICAL
PLANNING 2ND RESPONDENT**

ATTORNEY GENERAL 3RD RESPONDENT

AND

RACHEL MUTHEU NDAMBUKI EXPARTE APPLICANT

RULING

1. The Judicial Review proceedings herein were commenced by the Ex-parte Applicant herein, Rachael Mutheu Ndambuki, on 3rd August 2022. An Ex-parte Chamber Summons seeking leave to institute these proceedings was on the aforesaid date granted by this Court (Byram Ongaya, J) and the Ex-parte Applicant was ordered to file and serve a substantive Notice of Motion within 7 days from the said date. The leave granted was ordered to operate as stay of transfer of the Ex-parte Applicant to the Ministry of Petroleum and Mining as conveyed by the letter dated 27/6/2022 as exhibited therein.
2. On 8th August 2022, the Ex-parte Applicant filed the substantive Notice of Motion evenly dated, seeking:-



- a. an order of Certiorari to bring to this Honourable Court the decision of the 2nd Respondent to transfer the Ex-parte Applicant to the Ministry of Petroleum and Mining dated 27th June 2022 for purposes of quashing it.
 - b. an order of Mandamus to compel the Respondents to pay the Ex-parte Applicant her salary arrears accrued from February 2022 and monthly thereafter with immediate effect.
 - c. an order of Mandamus to compel the Respondents to comply and satisfy the decree of this Court dated 6th October 2020 granted in Mombasa ELRC Constitutional Petition No. 2 of 2019 within fourteen (14) days of the order of mandamus.
 - d. an order of mandamus to compel the Respondents to hand over the Survey Office, Taita Taveta, to the Ex-parte Applicant as the In-Charge under the supervision of the Director of Surveys.
 - e. an order of mandamus to compel the Respondents to pay the Ex-parte Applicant ksh. 3,500,000 awarded as general damages in the decree of this Court in Mombasa ELRC Constitutional Petition No. 2 of 2019 within fourteen (14) days of the order of mandamus.
 - f. in default, notice to show cause do issue against the Respondents to show cause why they should not be cited for contempt of Court.
 - g. that costs of the application be borne by the Respondents.
3. The application sets out grounds upon which it is brought, which are replicated in the Ex-parte Applicant's supporting affidavit sworn on 8th August 2022.
 4. It is deponed in the said supporting affidavit:-
 - a. that the Ex-parte Applicant is employed by the Ministry of Lands and Physical Planning as a Government Surveyor, of the rank of Principal Land Surveyor at Job Grade N, and currently the In-charge Survey Office, Taita-Taveta.
 - b. that when the claimant was transferred to Taita-Taveta in 2017, as the incharge survey office, she found complaints and street protests by some squatters of Ziواني Phase 1 and 2 of Settlement Scheme, which was a settlement scheme on land donated from Gicheha Farm.
 - c. that the Ex-parte Applicant learnt that the reason for the protests was the existence of a list of non-squatters who were to be considered for allocation of Ziواني Phase 1 and 2 Settlement Scheme vide a letter dated 24th July 2018 issued by the Deputy Commissioner Taita-Taveta sub-county to the Land Adjudication & Settlement Officer Taveta, in place of genuine squatters.
 - d. that on 29th August 2018, the Ex-parte Applicant received a phone call from the 1st Respondent who informed her that he had received a complaint from the Deputy County Commissioner Taveta Sub-County alleging that the Ex-parte Applicant was illegally allocating Ziواني Settlement Scheme to third parties; allegations which the Ex-parte Applicant denied.
 - e. that on 4th February 2019, the 2nd Respondent called the Ex-parte Applicant and enquired why she was allocating land in Gicheha Farm which was owned by the Kenyatta Family, which allegation the Ex-parte Applicant denied.
 - f. that on 6th February 2019, the 2nd Respondent issued a letter Ref. 200561629/93 deploying the Ex-parte Applicant to Garissa Survey Office.



- g. that the Ex-parte Applicant filed Mombasa ELRC Constitutional Petition No. 2 of 2019 (Rachel Mutheu Ndambuki -vs- Cabinet Secretary, Ministry of Lands and Physical Planning, Public Service Commission and Attorney General) whereupon conservatory orders were issued on 22nd February 2019 staying the 2nd Respondent's decision contained in the said letter of 6th February 2019.
- h. that in disobedience of the said conservatory orders, the 2nd Respondent transferred one Justice Kiprono Korir, a Senior Land Surveyor stationed at Ruaraka, to Taita Taveta Survey field Office as the incharge to replace the Ex-parte Applicant.
- i. that the said Justice Kiprono Korir illegally took over the Ex-parte Applicant's position by breaking into Taita Taveta Survey Offices at the Ministry of Lands and Physical Planning Wundanyi, without the authorization of or notice to the Director of Surveys or his representative, and without a handover of office equipment, accounting documents, office files, vehicle and survey documents, amongst others.
- j. that on the Ex-parte Applicant's application, the 2nd Respondent was on 25th October 2019 held to be in contempt by this Court, and was directed to issue a letter removing Justice Kiprono Korir as the In-charge Taita-Taveta Survey Office, and to let the Ex-parte Applicant resume work.
- k. that the 2nd Respondent ignored and defied the orders dated 25th October 2019, and was on 13th March 2020 sentenced to a fine of ksh. 250,000.
- l. that the petition was subsequently heard, and judgment was delivered on 6th October 2020. That todate, the interim orders dated 22nd February 2019, the contempt order of 25th October 2019, the contempt sentence of 13th March 2020 and the final Judgment of 6th October 2020 have not been complied with.
- m. that the Respondents appealed against both the contempt order and final judgment, but the Court of Appeal declined to order a stay of execution.
- n. that the appeal against the contempt order was filed out of time, and the Court of Appeal declined to extend time, rendering the appeal redundant.
- o. that on 18th February 2022, the 1st Respondent directed that the Ex-parte Applicant's salary be stopped.
- p. that on 27th June 2022, the 2nd Respondent illegally, arbitrarily and in egregious abuse of power, unilaterally transferred the Ex-parte Applicant from the Ministry of Lands and Physical Planning to the Ministry of Petroleum and Mining. That the letter was send by bus and it reached the Ex-parte Applicant on 28th July 2022, after the date of reporting.
- q. that the Ex-parte Applicant has built a carrier as a Surveyor for the past close to two decades, and that the decision to transfer her to another Ministry without stating the designation, grade or the role she is to take up is to condemn her career, skills and experience to the grave.
- r. that by virtue of the judgment dated 6th October 2020, the 2nd Respondent does not have delegated authority from the Public Service Commission and cannot, therefore, lawfully transfer the Ex-parte Applicant.
- s. that despite this Court's orders, the Ex-parte Applicant has not been able to recover her office or position because of the presence of Justice Kiprono Korir who is the incumbent.



- t. that since the Ex-parte Applicant's position is a statutory one and was taken over in a violent, illegal, criminal and chaotic manner, it is imperative that the Director of Surveys be involved in, and supervise the Ex-parte Applicant's resumption of office.
 - u. that the Court having quashed the decision to transfer the Ex-parte Applicant to Garissa and declared it null, void, ultra vires and in violation of the Ex-parte Applicant's constitutional rights, and that she should continue as the In-charge Taita Taveta Survey Office, that decision has not been implemented.
 - v. that despite this Court having quashed all the processes that flowed from the decision to transfer the Ex-parte Applicant to Garissa, Justice Kiprono Korir continues to occupy the Ex-parte Applicant's office and to discharge her responsibilities, and despite the Court having barred the Respondents from taking disciplinary action against the Ex-parte Applicant, her salary has been stopped; and the general damages of ksh. 3,500,000 have not been paid.
 - w. that the Ex-parte Applicant has suffered great injustice from the Respondents' abuse of power, acts of impunity and total disregard of the law.
5. The 3rd Respondent filed grounds of opposition to the Ex-parte Applicant's Notice of Motion on 4th October 2022 and stated:-
- a. that the application is misconceived, frivolous, vexatious and an abuse of the Court's process.
 - b. that orders sought are untenable and a nullity; and that the Applicant knows that the stoppage of her salary was not done maliciously, but because she failed to declare her wealth by filing Wealth Declaration Forms.
 - c. that the decision to transfer the Applicant is not focused on her, but on all other officers pursuant to Regulation 36(2) (a) of the Public Service Commission Regulations of 2020.
 - d. that the Applicant is guilty of laches.
 - e. that the Applicant is the author of her own misfortunes.
6. On 9th November 2022, I directed parties to file written submissions on the Ex-parte Applicant's Notice of Motion within specific timelines. Only the Ex-parte Applicant filed written submissions, and on 24th November 2022 I fixed the matter for Ruling on 2nd March 2023.
7. On 24th November 2022, after a ruling date had been reserved, the 1st and 2nd Respondents filed a Replying Affidavit sworn on even date by one Abuta Tom, a Deputy Chief State Counsel in the Ministry of Lands and Physical Planning. It is deponed in the said Replying Affidavit:-
- a. that the Ex-parte Applicant's transfer was purely normal, and the same was communicated to her vide a letter dated 27th June 2022 by the Director Human Resource on the strength of a letter by the Public Service Commission dated 15th June 2022.
 - b. that the transfer was devoid of ill-will or malice, and it also affected other officers who were deployed in various stations and departments as indicated in the said letter of 15th June 2022.
 - c. that failure to pay the Applicant's salary was not malicious, but instead it was as a consequence of failure to comply with Section 31 of the Public Officers Ethics Act, 2003, Declaration of Income, Assets and Liabilities for the period 2019-2021, which is within the Applicant's knowledge.



- d. that, after consideration by the Authorised Officer at the Ministerial Human Resource Management Advisory Committee in its meeting held on 31st August 2022, it was decided that the Applicant's salary be re-instated with effect from 1st February 2022, being the date it was stopped, and that communication in that regard was made to the Applicant and her Counsel vide a letter dated 28th September 2022.
 - e. that the Respondents have not ignored or refused to pay the decretal amount but instead, the delay in payment has been brought about by the transition of Government, and that the same is pending satisfaction at the account's office, and shall be paid soon once funds are available.
8. This Court's judgment in Mombasa ELRC Constitutional Petition No. 2 of 2019 dated 6th October 2020 (Rika J,) was among documents annexed to the Ex-parte Applicant's supporting affidavit which I have reproduced in paragraph 4 of this Ruling. The Court decreed as follows:-
- a. it is declared that the 1st Respondent's letter to the petitioner, dated 6th February 2019; is unconstitutional, invalid, null, void and ultra vires.
 - b. it is declared that the 2nd Respondent's delegation of functions to the 1st Respondent through the Delegated Instruments dated 30th June 2018, is unconstitutional, ultra vires and void.
 - c. it is declared that the 1st Respondent's letter dated 6th February 2019 and the process through which the decision was reached, violated the Petitioner's right to fair labour practices, right to equality and freedom from discrimination, right of access to information; freedom of conscience and right to security.
 - d. it is declared that the 1st Respondent's letter dated 6th February 2019 violated and totally disregarded the Petitioner's protection as a Public Officer under Article 236 of the Constitution.
 - e. an order of certiorari is hereby issued to remove to this Court and to quash the 1st Respondent's letter dated 6th February 2019 and all processes flowing from the said decision.
 - f. the petitioner shall continue discharging her duties as the In- Charge, Survey Office Taita-Taveta, without undue interference.
 - g. the 1st and 2nd Respondents are restrained from transferring, deploying or taking disciplinary action against the petitioner, arising from or connected to the complaint letter issued by the Deputy County Commissioner Taveta Sub-County dated 30th August 2018.
 - h. the Respondents shall pay the petitioner General Damages, assessed at ksh. 3.5 million.
 - i. no order as to costs.
9. In the application herein, the Ex-parte Applicant has sought orders of certiorari and mandamus as set out in paragraph 2 of this Ruling. Certiorari is a prerogative order in the context of remedies available against administrative actions. It removes proceedings from an administrative agency, body or an inferior Court or tribunal to be quashed on grounds of being ultra-vires (made without legal authority and therefore illegal), done in breach of the principles of natural justice or on grounds of error of law on the face of the record. As a general rule, certiorari applies to statutory bodies or agencies performing public duties.



10. On the other hand, mandamus is used to compel the fulfilment or performance of a duty where there is unwillingness or defiance on the part of a public body or officer. Halsbury's Laws of England, 4th Edition Volume 1 at page 111 (from paragraph 89 says:-

“ 89. the order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is on the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.

90. The order must command no more than the party against whom the application is made is legally bound to perform, where a general duty is imposed, a mandamus cannot require it be done at once; where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”

11. Court orders are legal pronouncements and commands that have the force of the law and are enforceable in law. They vest rights in parties. This Court made specific orders, pronouncements and commands in Mombasa ELRC Constitutional Petition No. 2 of 2019, on 6th October 2020. The Respondents disobeyed the said orders and continue to do so. Instead of restoring the Ex-parte Applicant back to office to continue discharging her duties as the In-Charge Survey Office Taita Taveta without undue interference as ordered by the Court on 6th October 2020, the Respondents deliberately ignored and disobeyed the Court's Orders for more than one year. On 27th June 2022, the Respondents purported to transfer the Ex-parte Applicant from the Ministry of Lands and Physical Planning in which the Office where she was ordered to continue discharging her duties is domiciled, to another Ministry. This was clearly in a bid to defeat this Court's said orders. It matters not that other officers were also transferred. The letter of transfer/release sought to be quashed, dated 27th June 2022, is shown to have been authored by the 2nd Respondent herein, who was the 1st Respondent in this Court's Constitutional Petition No. 2 of 2019, in which the orders in issue were given.

12. The culture of impunity in all its shapes and shades has no place in a civilized society like ours, and must come to an end. One cannot talk about the Rule of Law without talking about obedience of Court orders. Disobedience of Court orders is a vice that, if not checked, can eat into the fabrics that hold a society together.

13. Having considered the application and all materials present to the Court by the Ex-Parte Applicant, the responses filed by the Respondents and submissions filed on behalf of the Ex-parte Applicant, I am satisfied that the Ex-parte Applicant has demonstrated that the orders sought herein are merited, and I proceed to allow the Notice of Motion dated 8th August 2022 in the following terms:-

a. an order of certiorari is hereby issued bringing to this Honourable Court the decision of the 2nd Respondent to transfer the Ex-parte Applicant to the Ministry of Petroleum and Mining dated 27th June 2022 for purposes of quashing, and the same is hereby quashed.



- b. an order of mandamus is hereby issued compelling the Respondents to pay the Ex-parte Applicant's her salary arrears accrued from February 2022 immediately, if the same has not been paid, and thereafter monthly.
- c. an order of mandamus is hereby issued compelling the Respondents to comply with and to satisfy this Court's decree dated 6th October 2020 in Mombasa ELRC Constitutional Petition 2 of 2019 within fourteen (14) days of this order.
- d. an order of mandamus is hereby issued compelling the Respondents to handover the Survey Office, Taita Taveta to the Ex-parte Applicant as the In-Charge under the supervision of the Director of Surveys.
- e. an order of mandamus is hereby issued compelling the Respondents to pay the Ex-parte Applicant the ksh. 3,500,000 awarded and decreed as general damages in this Court's Mombasa ELRC Constitutional Petition No. 2 of 2019 within fourteen (14) days of this Court.
- f. in default of compliance with the compelling orders herein, the Respondents shall be cited for contempt of Court.

14. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 2ND MARCH 2023

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....for Applicant

..... for Respondent

